Supreme Court, U.S.
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No. 94-1025

In The

Supreme Court of the United States

October Term, 1994

JOHN T. ENGSTROM, ET AL.,

Petitioners,

v.

THE FIRST NATIONAL BANK OF EAGLE LAKE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 532(3) of the Soldiers' and Sailors' Civil Relief Act, which provides that "[n]o sale, foreclosure, or seizure of property for nonpayment of any sum due under any [obligation secured by . . . security in the nature of a mortgage upon real or personal property owned by a person in military service] . . . shall be valid if made . . . during the period of military service," prohibits a creditor bank, which has a lien on farm equipment to secure the debts of a family farmer who is on active military duty, from arranging an auction of the debtor's farm equipment, approving the sales at the auction, signing the debtor's name to the check for the proceeds from the auction, and applying those proceeds toward the debtor's and his family's outstanding farm loans with the Bank.

2. Whether the Fifth Circuit's interpretation § 532 of the Soldiers' and Sailors' Civil Relief Act as being inapplicable to the conduct of Respondent First National Bank of Eagle Lake in this case is inconsistent with the construction of the Act mandated by the Supreme Court in *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562 (1993).

3. Whether § 536 of the Soldiers' and Sailors' Civil Relief Act extends the protections of § 532 to an active service member's family members and their family farming entities who are affected by the military service.

QUESTIONS PRESENTED – Continued

4. Whether in rejecting Petitioners' claims under the Soldiers' and Sailors' Civil Relief Act the lower courts improperly applied and/or disregarded the proper standard of review of the evidence on a motion for summary judgment.

5. Whether a proper review of the summary judgment evidence in this case shows that there are genuine issues of material facts with respect to whether the Respondent Bank was responsible in whole or in part for the seizure, foreclosure on, and/or sale at auction of Petitioners' farm equipment while Captain Engstrom was on active military duty in the Persian Gulf.

LIST OF PARTIES

1. Petitioners are:

a) John T. Engstrom, Individually and as Next Friend of Andrea Engstrom, a minor;

b) Lyndia Engstrom, Individually and as Next Friend of Andrea Engstrom, a minor;

c) John T. Engstrom, Melissa Engstrom, and Cynthia Engstrom, Individually and d/b/a JTE Farms Joint Venture;

d) Coltair Farms, Inc.

2. Respondent is The First National Bank of Eagle Lake, Texas.

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To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COME NOW Petitioners John T. Engstrom and Lyndia Engstrom, Individually and as next friends of Andrea Engstrom; John T. Engstrom, Melissa Engstrom, and Cynthia Engstrom, Individually and d/b/a JTE Farms Joint Venture; and Coltair Farms, Inc., and request that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this cause, and as grounds for review by writ of certiorari Petitioners would respectfully show the Supreme Court the following:

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under 28 U.S.C. § 1254(1).

This is an appeal from a summary judgment granted by the district court and affirmed by the court of appeals in an action brought by Petitioners under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appx. § 501, et seq., with pendent state claims. The Fifth Circuit rendered its opinion and judgment on March 29, 1995, in Cause No. 93-2719, *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995).

STATUTES INVOLVED

The pertinent provisions of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §§ 501, et seq. include the following:

§ 532. Mortgages, trust deeds, etc.

(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some other person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service –

(a) stay the proceedings as provided in this Act [50 U.S.C. Appx. §§ 501, et seq.]; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107 [50 U.S.C. Appx. § 517][1], unless upon an order previously granted by the court and a return thereto made and approved by the court.[2]

(4) Any person who shall knowingly make or cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.[3]

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[1] Section 517 provides that the prohibitions of the Soldiers' and Sailors' Civil Relief Act may be modified or waived by written agreement executed by the service member during or after the period of military service. No such written agreement is at issue here.

[2] In 1991, shortly after the events in this case, an amendment to § 532(3) deleted the words "after the date of enactment of the Soldiers' and Sailors' Civil Relief Act and" following "valid if made." This minor technical amendment has no bearing on the issues presented here.

[3] Another 1991 amendment substituted the words "shall be fined as provided in Title 18, United States Code, or imprisoned for not to exceed

> **§ 536. Extension of benefits to dependents**
>
> Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under the provisions of this article upon application to a court therefor, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent.

STATEMENT OF THE CASE

I. Proceedings In The Courts Below

Petitioners filed this lawsuit in Texas state court in 1991. On August 26, 1991, Respondent removed this case to the Southern District of Texas, Houston Division, in Cause No. H-91-2392. (R. 10:19, 29)[4]

Petitioners then filed a First Amended Complaint. (R. 7:332) Petitioners' pleadings allege that in late 1990 and early 1991, while U. S. Navy Captain John T. Engstrom was on active military duty in the Persian Gulf, Respondent First National Bank of Eagle Lake ("the Bank") took action to foreclose on and sell at auction the Engstroms' family farm equipment, applying the proceeds toward the balance of the family's farm loans from the Bank which were secured by the equipment. Petitioners allege that the sale was invalid and

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one year" for the words "shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000."

[4] The notation "R" refers to the Record in this case. It is referenced by volume and page numbers (separated by a colon). For additional references, the district court's docket sheet listing the documents in the Record appears at the front of Vol. 1 of the Record, which is at present in the custody of the district clerk.

wrongful, rendering the Bank liable for violations of § 532 and § 536 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appx. § 501, et seq., as well as the Texas Deceptive Trade Practices Act, TEX.BUS.&COM.CODE § 17.41, et seq. (R. 7:332) On September 1, 1992, Respondent filed a motion for summary judgment on two alleged grounds:

(1) that the "undisputed evidence" shows that the Engstroms' farm equipment was not seized and sold by the Bank, but rather was "sold by [neighboring farmer] Jim Clipson acting at the direction of John Engstrom," and therefore the Soldiers' and Sailors' Civil Relief Act did not apply; or alternatively

(2) that none of the Plaintiffs other than John Engstrom has standing to sue under the Relief Act because the farm equipment was owned only by John Engstrom. (R. 7:230, 279, 277)

Petitioners filed a response to the motion for summary judgment, with attached affidavits by Captain Engstrom and his wife, Lyndia Engstrom, along with various deposition excerpts and extensive documentary evidence from the Bank's files on the Engstroms' loans. (R. 4:1311; 4:1242-1306) Petitioners later supplemented the response with additional documentary evidence. (R. 2:2396-2505)

On September 2, 1993, the district court granted the motion for summary judgment on the first alleged ground only. (R. 1:2530) In its accompanying memorandum, the district court declared that the Bank was not responsible for the sale of the Engstroms' equipment and therefore could not be held liable under the Soldiers' and Sailors' Civil Relief Act. (R. 1:2529)[5]

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[5] In its order granting partial summary judgment on Petitioners' claims under the Soldiers' and Sailors' Civil Relief Act, the district court also directed that the pendent claims under Texas law be severed and remanded to state court. (R. 1:2530) Respondent filed a cross-appeal of the remand order.

On March 29, 1995, the Fifth Circuit affirmed the summary judgment and remand order by its opinion and judgment in *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995).

II. Statement Of Facts

Petitioner John T. Engstrom is a Captain in the United States Navy. In 1989-90, while Captain Engstrom was on reserve military status, he and his wife Lyndia Engstrom and their three daughters, Melissa, Cynthia, and Andrea Engstrom were operating a family rice farm in Colorado County, Texas. The rice farm was the Engstrom family's principal source of income; all of the family members participated in the farm labor and the running of the business. (R. 6:781, 779, 695-701, 684-690)

During 1989 and 1990, the First National Bank of Eagle Lake made several loans to John T. Engstrom and to two family business entities owned by John T. Engstrom and two of his daughters, Melissa and Cynthia: Coltair Farms, Inc., a Texas corporation, and JTE Farms Joint Venture.[6] The loans were for the purchase of various items of farm equipment and the financing of the Engstroms' rice farming business. (R. 6:781)

As of June 30, 1990, the total outstanding balance of the Engstroms' various loans from the Bank was $211,187. (R. 6:721) John Engstrom owed $63,396 on a promissory note for several consolidated loans which were secured by all of the Engstroms' farming equipment (including a GMC Suburban and various tractors, combines, trucks, tools, etc.), as well as an $18,000 real estate debt; JTE Joint Venture owed almost

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[6] The Fifth Circuit's opinion at one point mistakenly identifies Captain John T. Engstrom as "Tom" Engstrom and mistakenly lists "John T. Engstrom" as one of the Engstroms' children. 47 F.2d at 1462. The Engstroms have no sons. It is Captain Engstrom himself who was doing business as JTE Farms Joint Venture with his two eldest daughters, Melissa and Cynthia.

$80,000 on two other loans, one secured by the same farm equipment as John Engstrom's loans and the other by the Engstroms' 1990 rice crop; and Coltair, Inc. owed $50,181 on another loan secured by the 1990 rice crop. (R. 6:231-234, 721)

The Bank's file on the Engstroms' farm loans shows that the collateral on the loans collectively had been valued at $412,599.[7] (R. 6:721)

In spite of this initial high value placed on the collateral, the loan file reveals a continuing concern on the Bank's part about repayment of the loans due to the poor crop yields in 1990 and the devaluation of the Engstroms' collateral as a result. The file reflects that as of at least June 30, 1990, the Bank had a contingent plan to "liquidate" the farm equipment in order to satisfy the debts if they were not paid by the end of 1990. The monthly loan-status reports from the Bank's file during the Summer and early Fall of 1990 describe the Engstroms' debt situation and the Bank's planned course of action. After setting out the various loan balances, these reports (dated as indicated) state in part as follows:

June 30, 1990

" * * *

COMMENTS: **John understands that he has to pay out this year.**

* * *

ACTION PLAN: If debtor does not pay out from 1990 harvest, ask him to move loan or furnish high-quality collateral **or liquidate.**

STATUS: Awaiting harvest and sale of crop."

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[7] The Fifth Circuit's opinion mistakenly states that the Engstroms' *debts* to the Bank amounted to "approximately $412,600." 47 F.2d at 1461. The collective *debts* at that time amounted to $211,187; the Bank had valued the *collateral* at $412,599.

The failure by the court of appeals to get a number of the basic *undisputed* facts straight contributes to Petitioners' dismay about the court's flawed review of the *disputed* facts and testimony in evidence.

(R. 6:721) (emphasis added)

July 31, 1990

[same as June 30 summary]

(R. 6:723)

August 31, 1990

" * * *

COMMENTS: **John understands that he has to pay out this year.**

* * *

ACTION PLAN: If debtor does not pay out from 1990 harvest, ask him to move loan or furnish high-quality collateral **or liquidate**.

STATUS: Awaiting harvest and sale of crop. He has approximately 140A of rice to cut. Plans to start o/a 9/12. Will have no second crop. Expects yields of 31 or 32 bbls. overall. **His naval reserve unit has not been ordered to active duty. He plans to volunteer for duty during the Christmas holidays."**

(R. 6:724) (emphasis added)

September 30, 1990

" * * *

COMMENTS: **John understands that he has to pay out this year.**

* * *

ACTION PLAN: Debtor is to come in 10-10-90 and discuss results of 1990 farming program. If he does not expect to pay out, ask him to move loan or furnish high-quality collateral **or liquidate**.

STATUS: Harvest of first crop is complete. Will have no second crop. Expects yields of 31 or 32 bbls. overall. **He is a naval reservist and expects to be called shortly for a 3 month tour in the Middle East."**

(R. 6:725) (emphasis added)

In October 1990, as expected, Captain Engstrom was reactivated from the Naval reserves and was assigned to active duty with the United States Navy in the Persian Gulf during the Desert Shield and Desert Storm operations. (R. 6:780-781, 711-718; 7:252-253)

Prior to his departure for duty, Captain Engstrom met with the Bank's executive vice-president, Travis Wegenhoft, concerning the handling of the Engstroms' loans while he was overseas. Wegenhoft agreed to an arrangement whereby one of the Engstroms' neighboring farmers, Jim Clipson, would be authorized to sell some of the Engstroms' farm equipment, *one item at a time*, and to apply any sales proceeds to the Engstroms' loan payments. The Bank was to supervise and control all aspects of Clipson's conduct, from advertising to repairing equipment to effectuating sales. Clipson was to receive a five percent commission for handling the sales. (R. 6:780-781, 713-715)

Captain Engstrom prepared a specific price list for Clipson to follow in selling each item of the farm equipment, and Engstrom discussed the price list with Wegenhoft. (R. 6:714) Captain Engstrom also set up a special account at the Bank in which Clipson was to deposit the proceeds of the sales of any equipment and from which withdrawals could be made for any necessary repairs on the equipment. (R. 712-13)

Captain Engstrom specifically instructed Wegenhoft *and* Clipson *not* to sell the Engstroms' farm equipment at an auction sale. Captain Engstrom and Wegenhoft agreed that if the Engstroms' farm debts were not paid off by the time he returned from active duty, the Engstroms and the Bank would *then* decide on a further course of action. (R. 6:713-715; 7:254)

Despite these explicit agreements, the Bank went ahead and arranged to have the bulk of the Engstroms' farm equipment sold at an auction while Captain Engstrom was in the Persian Gulf. The Bank's loan-status reports after Captain Engstrom's departure in October 1990 reveal the Bank's plan

of action and the extent of the Bank's awareness of Captain Engstrom's situation:

October 30, 1990

" * * *

COMMENTS: **Debtor has been called to active duty with the Navy in the Persian Gulf. Crop yields were disastrously low. All income from the sale of crops has been received.** Payment of ASCS deficiency payment is in doubt. Mainly because of increased doubt about the deficiency payment. [sic] The Coltair Farms, Inc. note and note 3 [one of the two JTE loans] above were charged off after the above date. Also, an exposure of $30,000 was estimated for note 4 [the other JTE loan].

* * *

ACTION PLAN: ***Have arranged*** **for Jim Clipson, Jr. to sell all equipment.** Rent house is for sale. Will suggest lowering price closer to values used here.

STATUS: ***Have*** **an appraisal of equipment from local dealer and** ***proceeding*** **to sell equipment. Anything not sold will go into** ***Bank's equipment auction.***"

(R. 6:746) (emphasis added)

November 30, 1990

" * * *

COMMENTS: **Debtor has been called to active duty with the Navy in the Persian Gulf. Crop yields were disastrously low. All income from the sale of crops has been received.** Payment of ASCS deficiency payment is in doubt. Charged off $19,641 on the JV [JTE] and $65,183 on Coltair Farms, Inc.

* * *

ACTION PLAN: ***Have arranged*** **for Jim Clipson, Jr. to sell all equipment.** Rent house is for sale.

> Will suggest lowering price closer to values used here.
>
> STATUS: ***Have*** **an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into *Bank's equipment auction in late January*."**

(R. 6:745) (emphasis added)

Clipson admitted in his deposition that during the time Captain Engstrom was in the Persian Gulf, Clipson consulted repeatedly with Wegenhoft and obtained the Bank's approval before selling any of the Engstroms' equipment: "I took everything to Travis [Wegenhoft]. I did everything through [Wegenhoft]. **[Wegenhoft] okayed whether anything was sold or what**." (R. 7:240) (emphasis added)

Wegenhoft admitted in his deposition that he approved the Engstroms' equipment sales. (R. 6:765) In fact, Wegenhoft signed the bills of sale on several items of the Engstroms' equipment which were sold in early January 1991. (R. 6:736-737, 747) The Bank also paid some of the repair bills on the Engstroms' equipment. (R. 6:752-761, 739-745, 731-736)

Finally, as the Bank had planned, the Engstroms' farm equipment was placed in the **Bank's equipment auction** for liquidation on January 26, 1991. About ten days before the auction, with the apparent cooperation of Clipson (who also owed the Bank on a farm loan at the time), the Engstroms' farm equipment was gathered and taken to a site in Eagle Lake, Texas, where the Bank had arranged with an auctioneer to auction off various Bank debtors' properties. (R. 7:246-248)

The Bank's senior vice-president, Sam Thomson, admitted that he arranged for the auction, contacted the auctioneer, and selected the location of the auction, and that both he and Wegenhoft were present at the auction to see what amounts the Bank would realize from the sale of the equipment. (R. 4:1653-1660, 6:767) In addition, the Bank paid for advertising for the auction and charged the cost to the Engstroms' loan balances. (R. 6:733-34, 760)

Captain Engstrom had no advance notice that his property was going to be auctioned off. (R. 6:780)

The Engstroms' farm equipment sold at the auction for the meager total of $63,952.50; after the Bank deducted a commission for Clipson, the Engstroms' netted only $60,115.35. (R. 6:719, 748) **The Bank took the sale proceeds and applied them toward the balance of two of the Engstroms' loans. Travis Wegenhoft signed John Engstrom's name to the check directing the payment of the proceeds to the Bank and indicating the amounts to be applied to the loan balances**. (R. 6:719)

On February 1, 1991, Wegenhoft sent a handwritten note to Lyndia Engstrom which read as follows:

> Dear Lyndia,
>
> **This morning we received the proceeds from the sale of your farm equipment sold last Saturday, Jan. 26. We ran the funds through your checking account and applied them to the appropriate notes.**
>
> Copies of these transactions are enclosed along with a copy of the list of the equipment sold and what each item brought.
>
> **I know this is hard for you, but you can be proud of what John is doing.** Let me know if I can be of any assistance.

(R. 6:749) (emphasis added)

The Engstroms' summary judgment evidence shows that they lost as much as $186,000 from the market value of their farm equipment because of the manner of its sale. (R. 7:253) The Engstroms also sustained severe injury to their credit reputations. (R. 7:255) The family members all suffered sleeplessness, nightmares, and emotional distress as a result of the wrongful foreclosure and sale of their property, and Lyndia Engstrom suffered such extreme emotional trauma immediately after the sale that she required hospitalization and psychological therapy. (R. 7:255)

ARGUMENT

I. The Fifth Circuit Misconstrued The Soldiers' And Sailors' Civil Relief Act

The lower courts' holding that Respondent First National Bank of Eagle Lake did not violate § 532 of the Soldiers' and Sailors' Civil Relief Act by its actions in effectuating the foreclosure and sale of Petitioners' farm equipment at the Bank's auction stands in disregard of the terms of the statute and the evidence in this case.

The mandate of § 532(3) is specific, direct, and unequivocal with respect to obligations secured by any type of mortgage on real or personal property of persons in military service: **"*No sale, foreclosure, or seizure of property* for nonpayment of any sum due under any such obligation . . . *shall be valid* . . . if made during the period of military service."**

Both the district court and the court of appeals concluded as a matter of law that the Bank did not violate § 532(3). However, the lower courts seriously misconstrued the law applicable to this case and inexplicably disregarded much of the evidence and many of the facts to which the law must be applied.

Curiously, neither the district court in its memorandum nor the Fifth Circuit in its opinion saw fit even to mention, let alone discuss or attempt to distinguish, this Court's recent decision in *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562 (1993), in which the Court gave a clear directive as to the proper construction of the Soldiers' and Sailors' Civil Relief Act.[8]

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[8] The lower courts completely ignored *Conroy* despite Petitioners' extensive discussion of *Conroy* in their briefs to both courts. See, for example, the Brief of Appellants, pp. 17-19. The Fifth Circuit also surprisingly failed to cite or discuss its own even more recent decision liberally construing the Relief Act in affirming a *criminal* conviction under § 535 of the Act. *United States v. Bomar*, 8 F.3d 226, 231 (5th Cir. 1993). Again, Petitioners had discussed *Bomar* at some length in their Brief of Appellants, at pp. 19-21.

At issue in *Conroy* was § 525 of the Act, which similarly protects service members by providing that the "period of military service shall not be included . . . in computing any period . . . provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

The petitioner in *Conroy* was an Army officer who owned a parcel of land in Maine. He had failed to pay real estate taxes for 1984-1986, resulting in a tax lien which he had 18 months to pay off or else lose title to the property to the city. Notwithstanding § 525, the lower courts in *Conroy* upheld the forfeiture of the officer's title to the land after his non-payment of the tax lien during the 18-month redemption period, reasoning that the officer's service status had not impaired his ability to pay.

Reversing the lower courts, the Supreme Court held that § 525 rendered the forfeiture invalid. The Court pointed out that "[t]he statutory command in § 525 is unambiguous, unequivocal, and unlimited." *Conroy*, 113 S.Ct. at 1564. Observing that the very essence of the Relief Act is that it "suspends various civil liabilities of persons in military service," *id.* at 1563-4[9] the Court held that Congress's command

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[9] In the very first section of the Act (other than the title section), 50 U.S.C. Appx. § 510, Congress makes the protective purpose of the Act explicit:

> In order to provide for, strengthen, and expedite the national defense . . . and to enable the United States the more successfully to fulfill the requirements of the national defense, **provision is hereby made to suspend the enforcement of civil liabilities, in certain cases, of persons in the military service of the United States** in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following **provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in the armed services** . . . .

(emphasis added)

must be enforced according to its terms regardless of whether a particular liability sought to be enforced against a service member happens to impose any particular degree of hardship.[10]

This Court has also previously stated, in *Boone v. Lightner*, 319 U.S. 561, 574 (1943), that "[t]he Soldiers' and Sailors' Civil Relief Act is *always* to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." (emphasis added)

The same construction applies to § 532(3) of the Relief Act in the present case. But the Fifth Circuit, having ignored *Conroy*, also disregarded its mandate regarding construction of the Relief Act's terms. Instead of applying the statute's unambiguous and unlimited command literally and broadly, the Fifth Circuit's discussion of the Relief Act falls back on pre-*Conroy* equivocation, citing old state court decisions for the propositions that "[a]lthough the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims," and that the Act "is to be administered as an instrument to accomplish substantial justice which requires an equitable consideration of the rights of parties to the end that their respective interests may be properly considered." 47 F.3d at 1462.

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[10] See also *In re A. H. Robins & Co.*, 996 F.2d 716, 718 (4th Cir. 1993) (mandatory tolling of limitations periods in § 525 not dependent on actual effect on service member's exercise of legal rights); *Detweiler v. Peña*, 38 F.2d 591, 593 (D.C. Cir. 1994) (§ 525 tolling provision's command is "unexceptionable"); *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah 1977) (plaintiff in Relief Act case held not required to prove that inability to pay on installment contract for purchase of automobile was due to military service; defendant who repossessed car while plaintiff was on active duty was still liable); *Pacific Finance Corp. v. Gilkerson*, 217 S.W.2d 440 (Tex.App. – Beaumont 1948, no writ) (wrongful repossession of armed service member's automobile in violation of Relief Act entitled service member to recover actual and exemplary damages).

Section 532(3) does not call for weighing of interests or contemplation of the parties' "equitable considerations." The statute simply declares outright that **"*no* sale, foreclosure, or seizure of property for nonpayment . . . shall be valid . . . if made during the period of military service."**

In light of this categorical statutory mandate, the only proper issue for consideration is whether the actions of the Respondent Bank render it responsible in whole or in part for the sale, foreclosure, and/or seizure of Petitioners' farm equipment.

Acknowledging that Captain Engstrom "was undoubtedly a member of the class protected by the Relief Act," 47 F.3d at 1463, the Fifth Circuit further recognized that "[t]he Bank arranged the auction, signed off on some of the bills of sale, and signed John Engstrom's name to the checks in order to apply the auction proceeds to the debt." *Id.* Nonetheless, the court accepted the Bank's claim of entitlement to summary judgment on the purported grounds that the Bank did not itself directly seize the equipment and place it in the auction, but rather that the Engstroms' neighbor Jim Clipson did so, and that the Bank therefore could have no liability under the Relief Act. *Id.*

The Fifth Circuit's concept of the Act's purview is far too narrow. Even the conceded actions of the Bank with respect to the sale of the Engstroms' farm equipment defy the absolute statutory prohibition. If anything, the *undisputed* evidence revealing the role of the Bank compels the conclusion as a matter of law that the Bank transgressed § 532(3) by arranging for and taking the proceeds from the sale of the Engstroms' property while Captain Engstrom was on military duty overseas. The sale which the Bank organized and from which the Bank directly benefitted was *invalid*, and the Bank was thereby unjustly enriched. That is enough for Petitioners to maintain their cause of action against the Bank under § 532(3) and to hold the Bank accountable for the loss caused by the unlawful sale of Petitioners' property.

II. The Lower Courts Misapplied The Standard Of Review Of The Evidence Relating To A Motion For Summary Judgment

At the very least, the conclusion that the Bank bears responsibility for the invalid sale of the Engstroms' equipment is one that can reasonably be inferred from the evidence of record. Particularly probative are the notations in the Bank's loan files about Captain Engstrom's military status and about the Bank's plans to require payment on the loans by the end of 1990 or else have the Engstroms' farm equipment **"liquidate[d]"** or placed in **"the bank's equipment auction."** Taken together with the Engstroms' testimony about their dealings with the Bank, and the admissions in the deposition testimony of the Bank's own executive officials, Travis Wegenhoft and Sam Thomson, about their role in the auction of the Engstroms' equipment and the disposition of the proceeds, sufficient evidence plainly exists to support Petitioners' claims that the Bank violated § 532(3).

The lower courts, however, held otherwise, viewing the evidence as conclusively exonerating the Bank of responsibility. Both the district court's memorandum and the opinion of the court of appeals give lip service to the proper standard of review of the evidence pertaining to a motion for summary judgment under *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, and their many progeny. See, e.g., *Engstrom*, 47 F.3d at 1462. But the lower courts' ostensible application of the *Celotex/Anderson* standard to the evidence of record in this case reflects more a zeal for granting summary judgments than a fair and proper consideration of the evidence.[11]

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[11] The Fifth Circuit's increasing affinity for summary judgments, and its concomitant willingness to downplay or disregard the non-movants' evidence, is reflected in its recent *en banc* decision in *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) The *en banc* majority in *Little* justified its approach to summary judgments in part by bemoaning "back-

The standards of review of a summary judgment motion established in *Celotex* and *Anderson* were not intended to grant *carte blanche* to the lower courts to weigh conflicting evidence, to decide what evidence to accept or reject, or to elect whose testimony to believe. In order to temper and restrain the lower courts' increasing penchant for easing their own burdens by too casually granting summary judgments in reliance on the *Celotex/Anderson* line of cases, they must be required to abide by this Court's cautionary admonitions in *Anderson*:

> **[I]n ruling on a motion for summary judgment, the judge must view the evidence through the prism of the substantive evidentiary burden.** This conclusion is mandated by the nature of this determination. The question here is whether a jury could find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. * * *
>
> **Our holding that the . . . standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,** whether he is ruling on a motion for summary judgment or a directed verdict. **The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor**.

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logs in the district courts and the high cost of litigation." *Id.* at 1076. Those factors should have nothing to do with the evaluation of evidence to determine the existence of genuine, material fact disputes in a given case; their very invocation suggests that clearing the courts' dockets is of greater importance than citizens' right to have their day in court on legitimate civil claims.

Id. at 259-60. (italics are the court's; boldface emphasis added)

In the present case, the district court and court of appeals have engaged in the very sort of judicial usurpation of the jury's role decried in the above passage from *Anderson*. The lower courts' summary denial of Petitioners' right to trial by jury is especially unwarranted in light of *Conroy's* recent explication of the "substantive evidentiary burden" for a claim by an aggrieved member of the armed services under the Soldiers' and Sailors' Civil Relief Act.

A. The District Court Disregarded Evidence About The Bank's Role In The Sale Of The Engstroms' Property

The district court concluded as a matter of law that the Bank did not violate the Relief Act because of Jim Clipson's involvement in Captain Engstrom's arrangement with the Bank for making loan payments while he was away on military duty.

This simplistic conclusion does not reflect a thorough review of the evidence of record; in fact, the court's memorandum opinion makes *no* mention of the affidavits, bank records, and other controverting evidence filed by the Engstroms, which demonstrate the Bank's direct involvement in the planning and execution of the foreclosure and liquidation of the Engstroms' property, the proceeds from which went directly into the Bank's coffers.

The district court's decision certainly does not reflect a proper consideration of the evidence and reasonable inferences from the perspective of the non-movant Petitioners; to the contrary, the court's memorandum opinion relies exclusively on short, self-serving excerpts of deposition testimony by the Bank's own officers (which were attached to the Bank's motion for summary judgment), and disregards an abundance of controverting evidence showing the Bank's active role in the unlawful sale of the Engstroms' property.

The district court's initial discussion of the background facts, although sparse, is generally correct:

> John Engstrom was called to active duty in October 1990, and was deployed to the Persian Gulf on October 23, 1990. Pls' Original Petition at p. 2. Prior to his departure, Engstrom made arrangements with the Bank for a neighbor, James Clipson, to carry out the orderly sale of Engstrom's assets as necessary to meet payments due on outstanding loans. Id. Plaintiffs contend that John Engstrom notified the Bank not to sell his equipment at an auction sale. Despite Engstrom's request[,] on January 26, 1991, an auction was conducted at which the plaintiffs' equipment was allegedly sold for wholly inadequate consideration.

(See Appendix: District Court Memorandum, p. 2)

After this introductory statement, however, the district court departs from the undisputed background facts and purports to resolve contested facts about the events in question:

> Although plaintiffs endeavor to show that the Bank carried out the auction, all plaintiffs have actually demonstrated is that Bank officers aided "people that were interested in selling some equipment." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 114; Dep. of Sam Thomson at p. 114. Sam Thomson, a bank officer, merely assisted in contacting an auctioneer and also arranged for an auction site. He explained that "it's unfair to characterize it as the bank's auction." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 88; Dep. of Sam Thomson at p. 88.[12] * * *

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[12] As shown by the district court's quotations from specific evidentiary attachments, the court's conclusions are based on assuming the credibility and accuracy of isolated snippets of the deposition testimony of Sam Thomson, one of the Respondent Bank's own involved officers.

> The sole violation asserted against the Bank under the Soldiers' and Sailors' Civil Relief Act is that the Bank allegedly seized the plaintiffs' equipment and sold it at auction at an unreasonably low price. The Bank's summary judgment evidence demonstrates that it was Clipson and not the Bank that placed the equipment in auction. Def.'s mot. for Summ. J. at Ex. B at pp. 36-37, 54-55; Dep. of James Clipson at pp. 36-37, 54-55. In an effort to raise a genuine issue of material fact the plaintiffs contend that they never gave Clipson the authority to sell the equipment at an auction sale. Assuming, arguendo, that Clipson was mistaken about his authority to sell the plaintiffs' equipment at an auction[,] the damage sustained could not be imputed to the Bank, but rather to Clipson who is not a party to this proceeding. The Bank did not violate the statute.

(See Appendix; District Court Memorandum, pp. 2, 4-5)

These few conclusory "findings" constitute the sum total of the district court's discussion of the evidence of record. As the opinion states, the court adopts as determinative *"the Bank's summary judgment evidence."* The court casually dismisses, with virtually no discussion, the *Engstroms'* summary judgment evidence, set out above, showing that the Bank was directly and integrally involved in the arrangement with Captain Engstrom and Clipson concerning how the Engstroms' debts were to be paid during his absence; that the Bank, in disregard of the agreed arrangements, directed, approved, and/or acted in concert with Clipson in the foreclosure, seizure, and sale of the Engstroms' farm equipment at *the Bank's auction* on January 26, 1991; and that the Bank received all of the proceeds of the sale.[13]

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[13] This abundance of evidence directly controverting the Bank's alleged lack of responsibility for the sale of the Engstroms' equipment was attached to Petitioners' response and supplemental response to

A. The Court Of Appeals Disregarded Evidence About The Bank's Role In The Sale Of The Engstroms' Property

The Fifth Circuit's discussion of the summary judgment evidence is, if anything, even more deferential to the movant Bank and disdainful of the Petitioners' controverting evidence than is the district court's memorandum.

The court of appeals gives three reasons for upholding the summary judgment: (1) that the Bank "thought that Clipson had Engstrom's permission to sell the equipment," *Engstrom* at 1464; (2) that there was "no summary judgment evidence inferring [sic] that Clipson was an agent of the Bank," *id.*; and (3) that the Bank's "acquiescence" in Clipson's sale of the equipment is insufficient to make the Bank liable under the Relief Act. *Id.* Petitioners will address these three points in order.

1. The Fifth Circuit Improperly Resolved Disputed Facts About The Bank's Knowledge Of And Involvement In The Sale

The court of appeals acknowledges that John Engstrom "testified that he told Clipson and Wegenhoft that his property was not to be sold at auction," *Engstrom* at 1463, and that "[t]he bank arranged the auction, signed off on some of the bills of sale, and signed John Engstrom's name to the checks in order to apply the auction proceeds to the debt." *Id.*

But the court then recites that "Clipson testified that he thought that he had John Engstrom's permission to sell the equipment at auction," *id.*, and (based on Wegenhoft's testimony about his alleged "understanding" that Engstrom instructed Clipson to deliver the equipment to the sale) that

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Respondent's motion for summary judgment. (R. 6:831-839, 682-781, 4:1653-1660; 2:2396-2505)

the Bank "also thought that Engstrom had given Clipson permission to sell the equipment at auction." *Id.* The court then reaches the remarkable conclusion that as a matter of law the Bank is not responsible under the Relief Act because "[t]he testimony is *uncontradicted* that Clipson sold the equipment with, what [the Bank] and Clipson thought was, Engstrom's permission." *Id.* at 1464. (emphasis added)

This conclusion (1) demonstrates a dexterous disregard for the court's own recounting of Captain Engstrom's explicit testimony directly refuting what Clipson and the Bank claimed about his instructions, and (2) rests improperly on assuming the credibility of the Bank officers' self-serving testimony about what the Bank "thought" with respect to Clipson's authority to auction off the Engstroms' equipment *en masse*. One could hardly contrive a more egregious example of a court's improper assumption of the jury's fact-finding role than the granting of a summary judgment based on (directly controverted!) testimony about what an interested party claims to have "understood" or "thought."

John Engstrom's affidavit and deposition testimony state *unequivocally* that the arrangements and agreements he made for servicing the loan payments were made with *both* Clipson *and* the Bank. (R. 6:780-781, 713-715) Captain Engstrom's affidavit vigorously refutes the contention that he gave either Clipson *or* the Bank permission to sell the equipment at auction; it states that **"I also specifically told Mr. Travis Wegenhoft not to sell the equipment at an auction sale while I was gone."** (R. 6:780-781) Captain Engstrom's affidavit further points out that he did not know of the transfer of the equipment from his barn to the auction site, and that he never even received notice that an auction sale would be held. (R. 6:780-781)

The notations in the Bank's own monthly loan-status reports show that the Bank obviously knew Captain Engstrom was on active military status overseas when the auction was arranged and held. (R. 6:745-6) And the entries stating: "***Have arranged* for Jim Clipson, Jr. to sell all equipment"**;

"*Have* an appraisal of equipment from local dealer and *proceeding* to sell equipment"; and **"Anything not sold will go into *Bank's equipment auction*,"** clearly implicate the Bank in the process of arranging and effectuating the sale. Indeed, the subject-less verb forms "Have" [an appraisal] and "Have arranged" [for the sales] necessarily refer to the Bank as the implied subject (or at least one of the subjects) of the verbs.

The lower courts could not properly conclude from this evidence that the Bank *undisputedly* "thought" the auction sale was effected by Clipson at Captain Engstrom's direction. To come to such a conclusion as a matter of law is to stand the summary judgment standard of review on its head.

The one case relied on by the Fifth Circuit as authority for its conclusion, *Pailet v. Ald, Inc.*, 194 So.2d 420 (La. App. 1967), *see Engstrom*, 47 F.3d at 1463 and 1464, does not provide support for the summary judgment rendered here. In *Pailet*, a serviceman/mortgagor's dry-cleaning equipment was surrendered to the mortgagee in consideration for forgiveness of the mortgage during the period of his military service. He was held not to have a claim against the mortgagee because his mother was found to have acted as his agent in resolving a complaint about the equipment by demanding the mortgagee to remove it in exchange for forgiveness of the debt. Notably, the fact-finder in *Pailet* determined the mother's authority to make the agreement on behalf of the mortgagor only after a trial on the contested agency issue and a resolution of the *conflicting testimony* on that issue. *Id.* at 422. In addition, the record in *Pailet* showed that the service member/mortgagor had made no effort to repudiate the agreement after learning of it, but rather had ratified it by his subsequent conduct. *Id.*

The court in *Pailet* held that there was no violation of § 531 of the Relief Act[14] because the mortgagee had not

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[14] Section 531 is similar to § 532; it provides that "[n]o person who has received . . . under a contract for the purchase or real or personal

initiated the rescission of the contract, but rather had made the agreement only upon the demand of the mortgagor's representative, and because the mortgagor/service member had not been prejudiced by the agreement made on his behalf, in which he had later acquiesced. *Id.* at 423.

Clearly, *Pailet* is inapposite here for at least two reasons: (1) the alleged agent's authority to act for the debtor in agreeing to the surrender of the property was determined by the fact-finder only after a *full trial of the contested facts*; and (2) the court relied in part on a lack of prejudice to the debtor, which is not a valid consideration under § 532(3) in the wake of this Court's observation in *Conroy* that "Congress included a prejudice requirement [in parts of the Relief Act] whenever it considered appropriate to do so, and that its omission of any such requirement in [other parts of the statute] was deliberate." *Conroy*, 113 S.Ct. at 1565.[15]

If whether the Bank "thought" Clipson was given permission to auction off the Engstroms' equipment is even a material fact affecting the Bank's liability for its involvement in the invalid sale, then a remand for trial is necessary in this

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property . . . a deposit or installment of the purchase price . . . from a person . . . who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof . . . except by action in a court of competent jurisdiction."

[15] Interestingly, as an example of a provision of the Relief Act in which the statutory protection is conditioned on a showing of prejudice, the Court in *Conroy* cited § 532(2), which authorizes a court to stay efforts to enforce a mortgage obligation "unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service." *Conroy*, 113 S.Ct. at 1565. Section 532(2) is not involved here, since the Bank did not commence a proceeding in court to enforce the Engstroms' obligations, but rather acted extra-judicially to satisfy a portion of their debts via the auction sale of their farm equipment.

case to permit a jury to resolve the direct conflict in the evidence about the Bank's state of knowledge of Clipson's authority in that regard.

2. The Fifth Circuit Improperly Resolved Disputed Facts About Whether Clipson Was Acting As An Agent Of The Bank

The evidence of record also establishes – or at the very least raises a reasonable inference – that Jim Clipson cooperated, coordinated, and worked in concert with the Bank, and/or as the Bank's agent, in foreclosing on, taking possession of, and selling the Engstroms' equipment at the auction.

As set out in the factual summary earlier, both Clipson – who was himself indebted to the Bank – and the Bank's executive vice-president, Travis Wegenhoft, admitted that Clipson continually consulted with Wegenhoft and that *Wegenhoft approved all of Clipson's sales of the Engstroms' equipment*. The notations referred to above in the Bank's loan files further indicate that the Bank actively managed the arrangements with Clipson to handle the sales. The Bank's senior vice-president, Sam Thomson, admitted that he, not Clipson, was the person who made all the arrangements for the January 1991 auction sale, including selecting the auctioneer. The auction – which involved sales of various farm debtors' property – was obviously for the Bank's benefit, not for Clipson's; it was, in the Bank's own repeated words from its loan file, **"the Bank's equipment auction."**

Other evidence of record supports the inference that Clipson was acting for the Bank rather than the Engstroms. While Clipson was attempting to sell the individual pieces of equipment (before the auction), a man named L. D. Schilling offered to buy the Engstroms' pickup for $3500. Lyndia Engstrom forwarded the offer to her husband, who told her to have Clipson refuse it. Despite her instructions to Clipson to turn down the offer, however, Wegenhoft called her and informed her that since the Bank had the title to the pickup, it

was going to go ahead and have it sold to Schilling for $3500. (R. 6:705-706, 750-751)

The totality of the evidence plainly gives rise to the reasonable inference that Clipson was acting as an agent for, and/or in concert with, the Bank in selling the equipment at the auction.

3. The Bank's Role Was Sufficient To Render It Liable For Causing An Invalid Sale Under § 532(4) Of The Relief Act

The Fifth Circuit has chosen to describe the Bank's role in the sale of the Engstroms' farm equipment as mere "acquiescence" to Clipson's conduct. That is not a fair characterization, nor does it in any event exonerate the Bank from liability for violation of the Relief Act's explicit prohibition.

The Bank certainly treated the sale of the Engstroms' property as its own. Wegenhoft not only approved Clipson's initial itemized sales, he actually signed the bills of sale on several of the items sold. Then the Bank's officers arranged for and attended the auction, and Wegenhoft even signed John Engstrom's name to the check turning over the proceeds of the auction sale to the Bank. (R. 6:719)

Finally, Wegenhoft had the audacity to write Mrs. Engstrom a personal note shortly after the auction, saying how badly he felt about having sold off her family's property but reminding her to be "proud of what John is doing" by his service to the country! (R. 6:749)

The Bank's actions, by any fair assessment, went well beyond mere "acquiescence" in a sale by Clipson. But even if all of this evidence were not sufficient to show that the Bank itself, by its direct role in the auctioning of the Engstroms' farm equipment, was sufficiently engaged in the "sale, foreclosure, or seizure of property for nonpayment of any sum" to violate § 532(3) alone, the evidence still demonstrates a fact issue on the Bank's liability for knowingly **"mak[ing] *or* caus[ing] to be made any sale, foreclosure, or seizure of**

property, defined as invalid by subsection (3) hereof . . . ." 50 U.S.C. Appx. § 532(4).

The Fifth Circuit dismisses this statutory language by asserting in a footnote that § 532(4) "is a criminal statue and [therefore] is not apropos to this discussion." *Engstrom*, at 1464, n. 1. To the contrary, § 532(4) clarifies who may be held answerable for an invalid sale conducted in violation of the strict prohibition of § 532(3). If one who *causes* an unlawful sale to be made may be responsible even to the extent of criminal sanctions, then surely such a party may also be civilly liable for the loss brought about by the violation of the Soldiers' and Sailors' *Civil* Relief Act.

Certainly there is sufficient evidence of the Bank's involvement to present a genuine issue of fact for the jury as to whether the Bank "made *or caused to be made*" a sale, foreclosure, or seizure of the Plaintiffs' farm equipment by means of arranging for "the bank's equipment auction."

Properly viewing the evidence and the reasonable inferences therefrom in the light most favorable to the non-movant Petitioners, and under the liberal – i.e., the literal – construction of § 532 of the Soldiers' and Sailors' Civil Relief Act in favor of service members as mandated by this Court's decision in *Conroy*, the summary judgment against Petitioner John Engstrom should be reversed.

III. Section 536 Of The Relief Act Protects Captain Engstrom's Family Members

Because of the lower courts' summary disposition of the case on the basis of the Bank's alleged non-liability for violation of § 532 of the Relief Act, the courts did not reach the other Petitioners' claims for relief under § 536 of the Act.

The Bank contends that only Captain Engstrom has standing to assert a claim under the Relief Act because only he was a party to the consolidated note and security agreement on the farm equipment. But one of the notes executed by JTE Joint Venture, in which Cynthia and Melissa Engstrom were joint venturers and thus necessarily joint obligors, was

also secured by the same equipment, and both the Engstroms and the Bank intended that the proceeds from any itemized equipment sales be used to pay off all of the Engstroms' notes, including those of JTE Joint Venture and Coltair, Inc. The net proceeds of the auction sale of the Engstroms' equipment ($60,115.35) were in fact applied to both John Engstrom's consolidated note ($54,334.42) *and* to a note executed by JTE Joint Venture ($5,780.93). (R. 749)

Section 536 expressly extends the same protections afforded by the Act to the dependents of a person in the armed services as to the person himself. See, e.g., *Reid v. Margolis*, 181 Misc. 222, 44 N.Y.S.2d 518 (1943) (Relief Act's protections extend to prohibit foreclosure on home of parents of service member who were dependent on son's income); *Tucson Telco Federal Credit Union v. Bowser*, 9 Ariz.App. 242, 451 P.2d 322 (1969).

To refuse to extend the statutory protection to the Engstrom family members and their family business entities would be to ignore the reality that the Engstroms' rice farm was the primary source of employment and income for all members of the family at that time, and that the entire family enterprise was adversely affected by Captain Engstrom's activation for military service.

Further, Lyndia Engstrom was presumptively a community property owner of the equipment purchased by John Engstrom during their marriage. It is the Bank's burden to prove that she had no interest in the equipment or that it was her husband's separate property. TEX.FAM.CODE § 5.02; *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975)

By virtue of § 536, all of the Petitioners, i.e. all of the Engstrom family and their closely-held family business entities, are entitled to a reversal of the summary judgment rendered against them.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners John T. Engstrom and Lyndia Engstrom, Individually and as Next Friends of Andrea Engstrom; John T. Engstrom, Melissa Engstrom, and Cynthia Engstrom, Individually and d/b/a JTE Farms Joint Venture; and Coltair Farms, Inc., pray that the Supreme Court grant their Petition for Writ of Certiorari, and that upon final hearing, the Supreme Court reverse the judgments of the courts below and remand this cause for trial; and that the Court grant Petitioners such other and further relief, at law or in equity, to which they may show themselves justly entitled.

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John T. ENGSTROM, and Lyndia Engstrom, Individually and as next friends for Andrea Engstrom, John T. Engstrom, Melissa Engstrom and Cynthia Engstrom, Etc., et al., Plaintiffs-Appellants, Cross-Appellees,

v.

The FIRST NATIONAL BANK OF EAGLE LAKE, Defendant-Appellee, Cross-Appellant.

No. 93-2719.

United States Court of Appeals,
Fifth Circuit.

March 29, 1995.

Serviceman sued bank under Soldiers' and Sailors' Civil Relief Act after his farm equipment, in which bank had security interest, was sold at auction while he was on active military duty. The United States District Court for the Southern District of Texas, Melinda Harmon, J., dismissed serviceman's claims but allowed complaint to be amended to allege state law claims and remanded state law claims to state court. On cross-appeals, the Court of Appeals, Stewart, Circuit Judge, held that: (1) bank's acquiescence in auction sale of serviceman's farm equipment and its organization of auction did not make it liable under Relief Act because bank thought that neighbor who sold equipment at auction had serviceman's permission and there was no evidence that neighbor was agent of bank; (2) allowing serviceman to amend complaint to add claims under Texas Deceptive Trade Practices Act was not abuse of discretion; and (3) remand of state law claims to state court was not abuse of discretion.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before JONES and STEWART, Circuit Judges, and DUPLANTIER*, District Judge.

STEWART, Circuit Judge:

John T. Engstrom and his family appeal the judgment of the district court dismissing their claims under the Soldiers' and Sailors' Civil Relief Act 50 U.S.C.App. §§ 501-593 against the First National Bank of Eagle Lake ("First National"). First National has filed a cross-appeal of the district court's judgments to allow the original complaint to be amended and to remand the state law claims to state court. For the following reasons, the judgments of the district court are affirmed.

BACKGROUND

John T. Engstrom operated a rice farm in Texas. His farm was financed by the First National Bank of Eagle County. Engstrom owed approximately $412,600 to First National. Part of this debt was secured by the equipment used on the farm. In October 1989, John Engstrom was called to active military duty and was deployed to the Middle East. Prior to his departure, Engstrom made arrangements with First National for a neighbor, James Clipson, to carry out the orderly sale of Engstrom's equipment, as necessary, to meet payments due on the outstanding loans. Engstrom met with Travis Wegenhoft,

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*District Judge of the Eastern District of Louisiana, sitting by designation.

First National's vice president, and obtained First National's consent to sell the equipment at private sales and to supply the sales proceeds to the loan balances. Some pieces of equipment were sold as a result of private sales, but on January 26, 1991, most of the equipment was sold at auction.

The equipment was moved to the auction site by Clipson. Sam Thompson, a senior vice president with First National, contacted the auctioneer and arranged a location for the auction. Equipment belonging to Engstrom and other farmers in the area was auctioned. Both Mr. Thompson and Wegenhoft were present at the auction. Following the auction, Mr. Wegenhoft signed Mr. Engstrom's name to the checks for Engstrom's portion of the proceeds, and had the proceeds applied to Engstrom's outstanding debt.

Tom Engstrom and Lyndia Engstrom, individually and on behalf of their children Andrea Engstrom, John T. Engstrom, Melissa Engstrom and Cynthia Engstrom d/b/a JTE Farms Joint Venture, and Coltair Farms, Inc. (collectively "Engstrom") filed suit in state court alleging that First National had violated the strictures of the Soldiers' and Sailors' Civil Relief Act ("Relief Act") which forbid the sale of the property during a military personnel's service period without a court order. He also filed pendent state claims. First National removed the suit to federal court.

First National filed a motion for summary judgment contending that it had not violated the Relief Act. Engstrom also filed a motion to amend his complaint. The district court granted both motions and then remanded

the state law claims to state court. Engstrom appeals the judgment of the district court dismissing his federal claims; First National has filed a cross-appeal contending that the district court erred in allowing Engstrom to amend his complaint.

STANDARD OF REVIEW

This Court's reviews a district court's grant of summary judgment *de novo. Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Summary judgment under Fed.R.Civ.P. 56(c) is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial. *Id.* at 322-24, 106 S.Ct. at 2552-53; Fed.R.Civ.P. 56(e).

A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.,* 812 F.2d 219, 222 (5th Cir.1987). There must be evidence giving rise to reasonable inferences that support the non-moving party's position. *St. Amant v. Benoit,* 806 F.2d 1294, 1297 (5th Cir.1987).

DISCUSSION

Engstrom contends that the district court erred in dismissing his claims under the Soldiers' and Sailors' Civil Relief Act 50 U.S.C.App. §§ 501-593. ("Relief Act"). The purpose of the Relief Act is to suspend enforcement of civil liabilities of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation. 50 U.S.C.App. § 510. The Relief Act applies to servicemen and reservists who are ordered to report for military service. *See* 50 U.S.C.App. §§ 511 & 516. The provision of the Relief Act are to be liberally construed. *Koons v. Nelson*, 11[illegible] Colo. 574, 160 P.2d 367, 372 (1945). Although the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims. *Slove v. Strohm*, 94 Ill.App.2d 129, 236 N.E.2d 326, 328 (1968). The Relief Act is to be administered as an instrument to accomplish substantial justice which requires an equitable consideration of the rights of parties to the end that their respective interests may be properly conserved. *New York Life Ins. Co. v. Litke*, 181 Misc. 32, 45 N.Y.S.2d 576, 582 (1943)

Amongst the Relief Act's many provisions is a prohibition against the sale or foreclosure of a serviceman's mortgaged property in 50 U.S.C.App. § 532. The pertinent provisions of 50 U.S.C.App. § 532 are as follows:

> (3) *No sale, foreclosure, or seizure of property for nonpayment of any sum due* under any such obligation, or for any other breach of the terms thereof . . . shall be valid if made during the period of military service or within three months thereafter. . . . [emphasis ours].

This provision applies to obligations incurred before or during military service. 50 U.S.C.App. § 532(2). A serviceman can give a written release to allow for the sale or foreclosure of his property. *See* 50 U.S.C.App. §§ 517 & 532(3). The Relief Act also allows agents authorized under state law to dispose of the serviceman's property. *See Pailet v. Ald, Inc.*, 194 So.2d 420 (La.Ct.App.1967).

Engstrom argues that First National sold his farm equipment in violation of the Relief Act. As a reservist called to active duty, Engstrom was undoubtedly a member of the class protected by the Relief Act. His obligation was incurred before he was called up to active service and thus he meets the qualifying provision of 50 U.S.C.App. § 532(2). The only question remaining is whether the bank violated the act by selling the equipment.

The summary judgment evidence submitted by the Bank and Engstrom is as follows: In the Fall of 1990, before John Engstrom was called up to military service, the bank had written in its loan reports that Engstrom's loans had to be moved or be liquidated. In his deposition, John Engstrom testified that before he left he arranged with Clipson and Wegenhoft to sell some of his equipment at private sale to pay some of the debt. He also testified that he told Clipson and Wegenhoft that his property was not to be sold at auction.

Clipson testified, in deposition, that he was the person who gathered Engstrom's equipment together and sold it at the auction. He also testified that John Engstrom had given him permission to sell the equipment when Engstrom had temporarily returned from the service one

weekend. Clipson also stated that he obtained the permission of the bank to sell the property. In his deposition, Wegenhoft testified that he had not directed the equipment to be sold. He stated that it was his understanding that Engstrom had given his permission to Clipson to sell the equipment at auction.

In the bank's loan reports is this November 30, 1992 statement about the status of the loan:

> ACTION PLAN: Have arranged for Jim Clipson, Jr. to sell all equipment. Rent house is for sale. Will suggest lowering price close to values used here.
>
> STATUS: Have an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into bank's equipment auction in late January.

The bank arranged the auction, signed off on some of the bills of sale, and signed John Engstrom's name to the checks in order to apply the auction proceeds to the debt.

The summary judgment evidence submitted to the district court demonstrates that it was Clipson, not First National, that placed Engstrom's equipment in auction. Clipson gathered the equipment together, took it to the auction, and sold it. Clipson testified that he thought that he had Engstrom's permission to sell the equipment at auction:

> Q Was it Travis [Wegenhoft] that asked you to go ahead and bring the equipment [to auction].
>
> A No, John [Engstrom] asked me to do it.

First National also thought that Engstrom had given Clipson permission to sell the equipment at auction:

> Q So, the bank didn't sell it at the auction sale.
>
> A No.
>
> Q Who did?
>
> A John Engstrom instructed Jim Clipson to deliver it to the sale. Well, that's my understanding; but from here it sounded like John Engstrom's folks were to deliver it.

The testimony is uncontradicted that Clipson sold the equipment with, what First National and Clipson thought was, Engstrom's permission.

Although Engstrom produced evidence that First National acquiesced in the sale of the equipment and that it organized the auction, First National is not liable under the Relief Act for selling the equipment for several reasons. First, as we have stated above, First National thought that Clipson had Engstrom's permission to sell the equipment. *See Pailet,* 194 So.2d at 423 (holding that duly authorized representatives may sell a serviceman's property). Second, Engstrom submitted no summary judgment evidence inferring that Clipson was an agent of the bank, which could impute Clipson's action to the bank, when the equipment was sold. Third, we have found no authority indicating that First National's acquiescence to Clipson's sale of the equipment or that First National's organization of the auction where the equipment was sold makes it liable under the Relief Act.[1]

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[1] Engstrom argues that First National is liable under 50 U.S.C.App. § 532(4) of the Relief Act for "mak[ing or caus[ing]"

In his brief, Engstrom strenuously argues that Clipson did not have permission to sell his equipment. He points to his own deposition and affidavits in which he unequivocally denies giving Clipson permission to sell the equipment. However, for summary judgment purposes, assuming arguendo that Clipson did not have the authority to sell the equipment at auction, such lack of authority would only give Engstrom a potential action against Clipson who is not a party to the lawsuit. As noted by the District Court, Engstrom's proof fails to establish liability of First National under the Relief Act.

CROSS-APPEAL

First National contends that the district court erred in allowing Engstrom to amend his complaint. The amendments added claims under the Texas Deceptive Trade Practices Act, the Texas Uniform Commercial Code, and a claim for negligence. First National argues that because the additional causes of action were dependent on the allegations that the bank sold Engstrom's equipment, it was futile for the district court to allow the amendments.

The Federal Rules of Civil Procedure provide that, after an answer has been filed, "a party may amend the party's pleading only by leave of court" and that "leave to amend shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In the absence of . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave

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a sale to be made. This section of the Relief Act is a criminal statute and is not apropos to this discussion.

sought should, as the rules require, be "freely given." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). This Court review a district court's denial of leave to amend a complaint for abuse of discretion. *Avatar Exploration Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 320 (5th Cir.1991).

In the amendments, Engstrom states that First National could be liable under the Texas Deceptive Trade Practices Act. This Act defines an unconscionable act as any act which takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree. Tex.Bus. & Com. § 17.45. Engstrom states that even if it was true that First National did not sell his equipment in auction, First National still knew before the sale that (1) the equipment was going to be sold and (2) the sale was contrary to his wishes and instructions.

In brief, Engstrom argues that First National could have committed a unconscionable act in taking advantage of his lack of knowledge, ability, experience, or capacity when it did not prevent the sale even though it had every right and opportunity to do so. The district court considered these claims under the factors enunciated in *Foman* and allowed the amendments. After thoroughly examining the record and the applicable law, we find no abuse of the district court's discretion in granting the motion to amend. We therefore find this contention to be without merit.

First National also contends that the district court erred in remanding the remaining state law claims to

state court.[2] The general rule is that state claims should be dismissed once the basis for federal jurisdiction has been dismissed. *Parker & Parsley Petroleum v. Dresser Industries Inc.*, 972 F.2d 580, 585 (5th Cir.1992). The factors to be addressed in determining whether to retain jurisdiction once the federal claims have been disposed of are judicial economy, convenience, fairness, federalism, and comity. *See, e.g., Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 307 (5th Cir.1991), *cert. denied*, 502 U.S. 1096, 112 S.Ct. 1175, 117 L.Ed.2d 420 (1992); *Parker & Parsley Petroleum v. Dresser Industries Inc.*, 972 F.2d 580, 585 (5th Cir.1992).

Although this case has been pending for three years and the parties were in the midst of trial preparation, the amount of judicial resources that were invested into this case, as noted by the district court, has been remarkably small. Since there has been no substantial commitment of judicial resources and the remaining claims can be routinely resolved, the district court did not abuse its discretion by remanding the remaining state claims to state court. *See Parker & Parsley*, 972 F.2d at 587.

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[2] We note that we have jurisdiction over the district court's decision to remand this case. In a case where the district court has the discretion over whether to remand a case, such as the instant case, we have the power to review the district court's decision on appeal. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir.1994).

CONCLUSION

Because there is clear evidence that First National Bank of Eagle Lake did not seize and sell Engstrom's property, the judgment of the district court dismissing Engstrom's Soldiers' and Sailors' Relief Act claims is AFFIRMED. The judgment of the district court granting Engstrom's motion to amend complaint is AFFIRMED. The judgment of the district court remanding this case to state court is also AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN P. ENGSTROM, ET AL, Plaintiffs,	)	CIVIL ACTION NO. H-91-2392
vs.	)	
FIRST NATIONAL BANK OF EAGLE LAKE Defendant.	)	

ORDER

In accordance with the memorandum of even date it is **ORDERED** that the Defendant's Motion for Summary Judgment (Instrument No. 32) is hereby **GRANTED** as to plaintiffs' claim brought under Soldiers' and Sailors' Civil Relief Act of 1940. It is further

ORDERED that the remainder of this case is hereby **REMANDED** to the 25th Judicial District Court of Colorado County, Texas, Cause No. 17,448.

SIGNED at Houston, Texas, this 31st day of August, 1993.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN P. ENGSTROM, ET AL, Plaintiffs,	)	CIVIL ACTION NO. H-91-2392
vs.	)	
FIRST NATIONAL BANK OF EAGLE LAKE Defendant.	)	

MEMORANDUM

(Entered Sept. 2, 1993)

Plaintiffs' bring this action for violations of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-593 (1981 & Supp. 1992), and the Texas Deceptive Trade Practices – Consumer Protection Act. Tex. Bus. & Com. Code Ann. §§ 17.41-17.63.[1] Plaintiffs allege that while John Engstrom was on active duty in the United States Navy during the Persian Gulf war the defendant repossessed and sold the equipment used in the plaintiffs' farming operations. Pending before the Court is the Motion for Summary Judgment (Instrument No. 32) filed by the defendant First National Bank of Eagle Lake (the "Bank"). Having considered the motion the response, the reply, and the applicable law the Court is of the opinion that the motion should be granted.

---

[1] This action was removed from the 25th Judicial District Court of Colorado County, Texas, on the basis of federal question jurisdiction.

John Engstrom was called to active duty in October 1990, and was deployed to the Persian Gulf on October 23, 1990. Pls.' Original Petition at p.2. Prior to his departure, Engstrom made arrangements with the Bank for a neighbor, James Clipson, to c ry out the orderly sale of Engstrom's assets as necessary to meet payments due on outstanding loans. Id. Plaintiffs contend that John Engstrom notified the Bank not to sell his equipment at an auction sale. Despite Engstrom's request on January 26, 1991, an auction was conducted at which the plaintiffs' equipment was allegedly sold for wholly inadequate consideration.

Although plaintiffs endeavor to show that the Bank carried out the auction, all plaintiffs have actually demonstrated is that Bank officers aided "people that where interested in selling some equipment." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 114; Dep. of Sam Thomson at p. 114. Sam Thomson, a Bank officer, merely assisted in contacting an auctioneer and also arranged for an auction site. He explained that "it's unfair to characterize it as the bank's auction." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 88; Dep. of Sam Thomson at p. 88.

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of

the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987).

The sole violation asserted against the Bank under the Soldiers' and Sailors' Civil Relief Act is that the Bank allegedly seized the plaintiffs' equipment and sold it at auction at an unreasonably low price. The bank's summary judgment evidence demonstrates that it was Clipson and not the Bank that placed the equipment in auction.[2] Def.'s Mot. for Summ. J. at Ex. B. at pp. 36-37, 54-55; Dep. of James Clipson at pp. 36-37, 54-55. In an effort to raise a genuine issue of material fact the plaintiffs contend that they never gave Clipson the authority to sell the equipment at an auction sale. Assuming, arguendo, that Clipson was mistaken about his authority to sell the plaintiffs' equipment at an auction the damage

---

[2] The Bank did not violate the Soldiers' and Sailors' Civil Relief Act by consenting to Engstrom's arrangement with Clipson to sell plaintiffs' equipment. *See generally Pailet v. Ald, Inc.*, 194 So.2d 420, 423 (La.Ct.App. 1967) (debtor's agent's voluntary return of equipment to creditor did not violate the Act).

sustained could not be imputed to the Bank, but rather to Clipson who is not a party to this proceeding. The Bank did not violate the statute.

The Court must now decide whether to retain jurisdiction over plaintiffs' pendent state claims. "When the single federal-law claim is eliminated at an 'early stage' of the litigation, the district court has 'a powerful reason to choose not to continue to exercise jurisdiction'." *Parker & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988)).

In *Carnegie-Mellon*, the Supreme Court stated that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. at 350 n. 7. Since there has been no substantial commitment of judicial resources and the remaining claims are routinely resolved, *Parker & Parsley*, 972 F.2d at 587 (citing *Shaffer v. Board of School Directors*, 730 F.2d 910, 912 (3rd Cir. 1984)), remand of plaintiffs' state law claims is proper. *Parker & Parsley*, 972 F.2d at 587.

Accordingly, defendants motion for summary judgment as to plaintiffs' federal claims will be granted an [sic] plaintiffs' pendent state claims will be remanded to the 25th Judicial District Court of Colorado County, Texas.

SIGNED at Houston, Texas, this 31st day of August, 1993.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN T. ENGSTROM, ET AL., Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
THE FIRST NATIONAL BANK OF EAGLE LAKE, Defendant.	)	H-91-2392

ORDER

(Entered Jan. 11, 1994)

Pending before the Court is the Defendant's Motion to Stay Remand (Instrument No. 93) in which the Defendant seeks a stay of the Court's Order dated September 2, 1993 (Instrument No. 90). The Court's Order granted summary judgment for the Defendant on the federal question in the case and remanded the remaining issues in the case to the state court from which the case had been removed. The Defendant takes issue with the Court's rationale for remand and seeks to distinguish its case from the precedents offered by the Court.

The issue of retaining jurisdiction over Defendant's state law claims related to the federal question that originally made the case subject to federal question jurisdiction is squarely within the trial court's discretion. 42 U.S.C. § 1441(c) (" . . . the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates."); *Carnegie-Mellon University v. Cohill,*

108 S.Ct. 614, 619-23 (1988) (holding that "pendant jurisdiction is a doctrine of discretion, not of plaintiff's right" and that a district court faced with a case involving single federal-law claim and a number of state-law claims "had to consider throughout the litigation whether to exercise its jurisdiction over the case. When the single federal-law claim was eliminated at an early stage of the litigation, the District Court had a powerful reason to chose [sic] not to exercise jurisdiction."); 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3739 (1985 & Supp. 1993).

The Court in *Carnegie-Mellon* concluded

> that a district court has discretion to remand to state court a removed case involving pendant claims upon a proper determination that retaining jurisdiction over the case would be inappropriate. The discretion to remand enables district courts to deal with cases involving pendant claims in the manner that best serves the principles of economy, convenience, fairness and comity which underlie the pendant jurisdiction doctrine.

Carnegie-Mellon, 108 S.Ct. at 623 (citations omitted).

> It has always been true that when a case is in federal court, either originally or by removal, the court has discretion whether to hear or to dismiss any state claims that are pendant to the federal claim that is the basis for jurisdiction. Ordinarily it is to exercise that discretion by dismissing the pendant claims if the federal claim has been dismissed before trial. The Carnegie-Mellon case goes beyond the prior law by recognizing in a removed case a discretion to remand the pendant state claims to state court

> rather than to increase the expense and time involved by dismissing and requiring the plaintiff to start over in state court.

14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3739 (1985 & Supp. 1993) (footnotes omitted). "[O]nce a federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect." *Robertson v. Ball*, 534 F.2d 63, 66 n.5 (5th Cir. 1976); 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3740 (1985 & Supp. 1993).

Finding that the decision to remand was within the Court's discretion, and finding that the Court properly considered the *Carnegie-Mellon* factors when it decided to remand, the Court declines the Defendant's suggestion to revisit the issue. The Court notes that the parties have already sought appellate review of the summary judgment and that denying the stay will allow the appeal to be decided expeditiously. Having considered the arguments of counsel and the applicable law, the Court

ORDERS that Defendant's Motion to Stay Remand is DENIED.

SIGNED at Houston, Texas, this 10th day of January, 1994.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

(2)

No. 94-2025

Supreme Court, U.S.
FILED
JUL 11 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN T. ENGSTROM, *et al.*,

Petitioners,

v.

THE FIRST NATIONAL BANK OF EAGLE LAKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT THE FIRST NATIONAL BANK OF EAGLE LAKE, IN OPPOSITION

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July 11, 1995

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QUESTIONS PRESENTED

1. Whether the lower courts' decisions that the First National Bank of Eagle Lake ("First National") did not violate the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501-591 (1988 & Supp. 1994), (the "Civil Relief Act") was consistent with this Court's holding in *Conroy v. Aniskoff*, ___ U.S. ___, 113 S. Ct. 1562 (1993).

2. Whether the lower courts correctly applied *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and their progeny in determining that petitioners failed to raise an issue of material fact in support of their claim that First National seized and sold John Engstrom's farm equipment in violation of the Civil Relief Act.

3. Whether the Fifth Circuit Court of Appeals was correct in rejecting petitioners' claim that First National violated section 532(4) of the Civil Relief Act.

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No. 94-2025

In The

Supreme Court of the United States

October Term, 1995

JOHN T. ENGSTROM, *et al.*,

Petitioners,

v.

THE FIRST NATIONAL BANK OF EAGLE LAKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT THE FIRST NATIONAL BANK OF EAGLE LAKE, IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' description of the record as contained both in the statement of the case and in the argument is inaccurate in numerous respects. The following summary accurately sets forth the record and also points out those mischaracterizations of the record pertinent to the issues presented:

This lawsuit arises out of a sale at an equipment auction of farm equipment owned by one of the petitioners, John T. Engstrom. The remaining petitioners are John Engstrom's wife, his three daughters, a joint venture (JTE Farms Joint Venture) in which he and two of his daughters

were joint venturers, and a corporation (Coltair Farms, Inc.), the stock of which he owns.

In 1989 and 1990, First National made several farming-related loans to John Engstrom, Coltair Farms, and JTE Farms Joint Venture. R.7. Because of successive poor farming performances, none of the loans were paid in accordance with their terms. Sometime during late summer 1990, John Engstrom learned that he would likely be reactivated to active duty in the Navy as a part of the Desert Storm campaign. In anticipation of his departure, John Engstrom made arrangements with his neighbor and friend, James H. "Jim" Clipson, Jr. to sell his farm equipment on a private treaty basis, *i.e.*, individually negotiated sales, directing that the proceeds be used to repay the maturing bank loans.[1] R.7. First National consented to the private treaty sales.[2]

---

[1] The equipment had been pledged to secure John Engstrom's obligations at First National.

[2] Petitioners assert several times in the petition that First National was to supervise Jim Clipson's private treaty sales. As is discussed in more detail below, the record does not support this assertion. The record evidence establishes only that First National approved the sales, in its capacity as lienholder. There is no record evidence that First National agreed or represented that it would supervise John Engstrom's agent, Jim Clipson, in the sale of the equipment. The record clearly establishes that responsibility for the sale of the equipment was delegated to Jim Clipson by John Engstrom. *See, e.g.*, R.780 (affidavit of John Engstrom). ("I told Mr. Wegenhoft that I had asked Jim Clipson to sell some of the farm equipment to pay off the notes at the Bank. . . . Before I left home, I told Mr. Clipson to sell the equipment piece by piece and that he could use our barn as a showplace. I also asked him to make repairs to the equipment so as to have a better chance at selling the equipment.")

The auction about which the petitioners complain was not a foreclosure sale of "various bank debtors' properties", as the petitioners assert. Petition at 11. In August 1990, Sam Thomson, an officer of First National, talked with Billy Bode an auctioneer in El Campo, Texas, about conducting an area-wide equipment auction in Eagle Lake. R.1662. The auction was not arranged to sell Mr. Engstrom's equipment, as petitioners imply, petition at 11, but rather as an accommodation to farmers in the surrounding community who had a desire to sell their surplus farm equipment. R.1660. Mr. Thomson arranged for the auction site. The auction was scheduled to take place in January 1991, a time when John Engstrom was on active service. R.7.

Petitioners contend that First National, with the cooperation of Jim Clipson, repossessed John Engstrom's farm equipment and had it sold at the auction. R.7. But First National did not repossess the equipment and take it to the auction to be sold. Jim Clipson did. R.242, 246-49. First National did not ask or direct Jim Clipson to gather up the equipment and take it to the auction. R.246-49. In fact, although disputed by John Engstrom, Jim Clipson testified that he took the equipment to the auction because John Engstrom asked him to do so one weekend when he returned to town after having been activated. R.248-49.

On September 1, 1992, after the lawsuit had been on file for more than a year, R.1-19, and after discovery in the lawsuit was substantially complete, First National filed the motion for summary judgment which is the subject of this petition. R.228-79. On September 2, 1993, the district court entered orders: (1) granting defendant's

motion for summary judgment as to the petitioners' Civil Relief Act claims, on the basis that it was Jim Clipson, not First National, who had sold John Engstrom's equipment; (2) granting leave to petitioners to add two state law legal theories based on the same conduct; and (3) remanding the state law claims. R.E.B:1; R.E.D:1-2; R.2530, 2527-28. The petitioners' appeal and First National's cross-appeal followed. Appellee's R.E.1:1-3; R.E.F:1-2; R.2531-34, 2551. The Fifth Circuit affirmed the trial court's rulings. *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995) (Petition, Appendix 1-12).

SUMMARY OF THE ARGUMENT

1. The determination of the Fifth Circuit Court of Appeals that petitioners failed to raise an issue of fact in support of their claim that First National seized and sold John Engstrom's equipment at auction in violation of the Civil Relief Act was consistent with *Conroy v. Aniskoff*, ___ U.S. ___, 113 S. Ct. 1562 (1993).

2. The undisputed record evidence is that the equipment was not seized and sold at auction by First National, but rather was sold by Jim Clipson acting, he believed, at the direction of John Engstrom, and not at the request of First National.

3. Because First National did not seize and sell John Engstrom's equipment, it also did not cause a sale of such equipment in violation of section 532(4) of the Civil Relief Act.

REASONS FOR DENYING THE WRIT

The specific allegation of petitioners' complaint was that First National seized John Engstrom's farm equipment and sold it at an auction while he was on active duty. R.7. Petitioners alleged that, by doing so, First National violated the Civil Relief Act's prohibition on sales by lenders to satisfy indebtedness owing to them by servicemen on active duty. 50 U.S.C. app. § 532(3) & (4) (Supp. 1994). The record, however, did not support petitioners' claim that First National had seized and sold the equipment at auction to satisfy indebtedness and, instead, established that the equipment was sold by Jim Clipson acting, he believed, at the direction of John Engstrom, and not at the direction (or even the request or encouragement) of First National. R.246-49. After a careful review of the record evidence, the district court, applying principles governing motions for summary judgment enunciated by this Court, granted summary judgment. The Fifth Circuit, applying the same well-settled principles, affirmed.

Petitioners' complaints about the lower court decisions are threefold. First, petitioners claim that in "construing" section 532(3) of the Civil Relief Act the lower courts failed to follow *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562 (1993), allegedly by failing to apply the Civil Relief Act literally and broadly. Second, petitioners argue that the lower courts did not properly apply the principles established by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and their progeny in evaluating the summary judgment evidence, because they allegedly "disregarded" evidence supporting petitioners' Civil Relief Act

claims. Third, they argue that the Fifth Circuit erred in determining that they had no claim under section 532(4) of the Civil Relief Act. As is shown below, none of petitioners' arguments has merit.

I

THE LOWER COURTS DID NOT MISCONSTRUE THE CIVIL RELIEF ACT

Petitioners' first argument is that the Fifth Circuit "disregarded [the] mandate [of *Conroy*] regarding construction of the [Civil] Relief Act's terms" which, petitioners say, is that the statute must be at once "literally" and "broadly" construed. Petition at 15. In *Conroy*, the issue presented was whether section 525 of the Civil Relief Act, relating to the suspension of periods of time for redemption of real property forfeited for payment of unpaid taxes, should be construed to apply only to cases in which the soldier's active service status had impaired his ability to pay the taxes. Not surprisingly, since that section of the Civil Relief Act, unlike others, contained no impairment requirement and since the legislative history did not support the implication of such an impairment requirement, this Court held such an implication was improper. Here, by contrast, summary judgment was not granted because petitioners could not satisfy an implied statutory amendment to the Civil Relief Act. Nor did the lower courts refuse to construe the statute literally or broadly. Rather, as is discussed in detail in Section II below, petitioners' claims failed because petitioners could not proffer evidence supporting the allegation of their complaint that First National had violated the Civil Relief

Act by seizing and selling John Engstrom's equipment to satisfy obligations owing to it.

Petitioners now assert, however, that, even if First National did not seize and sell John Engstrom's equipment, as they alleged in their complaint, First National could nevertheless be held liable under a literal and broad interpretation of the Civil Relief Act, because First National allegedly "benefitted" from the sale of John Engstrom's farm equipment. Petition at 16. This argument, however, was not timely raised below. It was neither pled nor advanced in the district court and was asserted for the first time in Petitioners' Reply Brief before the Fifth Circuit. It is elementary that petitioners cannot complain of the decisions of the lower courts on the basis of allegations of wrongdoing and theories of liability that they did not advance to the trial court. *See, e.g., Capps v. Humble Oil & Refining Co.*, 536 F.2d 80, 81-82 (5th Cir. 1976); *United States v. Board of Education*, 469 F.2d 1315, 1316 (5th Cir. 1972); *Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737, 740 (5th Cir. 1971); *Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976); *Williams v. United Distributive Workers*, 529 F.2d 509, 510 (6th Cir. 1976).

Moreover, even if petitioners had timely advanced their "benefit" theory, summary judgment would still have been proper. There is no language in the Civil Relief Act purporting to impose liability on a lender who only "benefits" from a sale by someone else, but who does not himself seek to enforce repayment of an obligation. Similarly, petitioners have not cited to any case in which such liability was imposed. In short, petitioners' benefit theory is legally untenable.

II

THE LOWER COURTS CORRECTLY APPLIED THE LAW GOVERNING SUMMARY JUDGMENTS

Petitioners' second argument is that the lower courts misapplied the standard for the review of evidence submitted in connection with summary judgment motions. More specifically, they complain that:

> Both the district court's memorandum and the opinion of the court of appeals give lip service to the proper standard of review of the evidence pertaining to a motion for summary judgment under *Celotex Corp. v Catrett*, 477 U.S. 317, 322 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, and their many progeny. *See, e.g., Engstrom*, 47 F.3d at 1462. But the lower courts' ostensible application of the *Celotex/Anderson* standard to the evidence of record in this case reflects more a zeal for granting summary judgments than a fair and proper consideration of the evidence.

Petition at 17. As the foregoing quotation makes plain, however, petitioners' complaint is not that the district court or the Fifth Circuit failed to apply the summary judgment standards established by *Celotex* and *Liberty Lobby*. Instead, their complaint is only that they disagree with the conclusion the district court and the Fifth Circuit reached in applying the facts of this case to those standards. Unless this Court is to review all summary judgments, such a disagreement provides no basis for this Court to exercise its power of discretionary review.

Furthermore, the trial court's decision to grant the summary judgment motion and the Fifth Circuit's decision to affirm the judgment were correct. The undisputed

record evidence is that John Engstrom's farm equipment was not seized by First National and sold at its direction, as petitioners alleged. Rather, Jim Clipson testified unequivocally that he, not First National, took the equipment to the auction and that, in doing so, he was acting at John Engstrom's request, not First National's. The testimony of Travis Wegenhoft, John Engstrom's bank officer, was to the same effect. The testimony is set forth in the Appendix at 1A.

Petitioners contend that this evidence was not decisive of their claims. They contend that there was other evidence, "disregarded" by the trial court and the Fifth Circuit, which controverted this evidence and raised fact issues as to: (a) whether First National caused the auction sale, and (b) whether Clipson was acting as an agent of First National in placing the equipment in the auction. Petition at 17-27. These arguments are without merit.

A. Petitioners Did Not Raise an Issue of Fact Supporting Their Claim That First National Caused the Sale.

Petitioners rely on three items of "evidence" for their contention that they raised an issue of fact as to whether First National was responsible for the auction sale. The items are as follows:

(1) The assertion that not only did John Engstrom not ask Jim Clipson to sell any equipment at auction, but that John Engstrom specifically instructed Jim Clipson not to do so;

(2) A problem loan report of First National, written prior to John Engstrom's period of active duty, stating that in the following crop year if John Engstrom "does not expect to pay out, ask him to move loan or furnish high-quality collateral or liquidate;" and

(3) A First National problem loan report that includes the following statements:

> "Have arranged for Jim Clipson, Jr., to sell all equipment. Rent house is for sale. . . . Will suggest lowering price closer to values used here. Have an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into bank's equipment auction."

Petition at 19-26. These three items do not raise a fact issue as to whether First National arranged for the equipment to be sold at auction.

As to the first item, there is *no* evidence that John Engstrom instructed Jim Clipson that he should not sell the equipment at auction, as the petitioners falsely claim. Petition at 22-23. John Engstrom's affidavit carefully avoids saying that, R.780, and in his deposition testimony Mr. Engstrom specifically stated that he did *not* give Jim Clipson any such instruction. His deposition testimony was as follows:

Q. And this [direction – that there should be no auction sale –] is a direction you gave to Mr. Clipson?

A. No . . . .

R.713-14. John Engstrom's only assertion was that he did not *ask* Jim Clipson to sell the equipment at the auction. This assertion may raise a question of fact as to whether Jim Clipson was correct in believing that he was acting at John Engstrom's request, as Jim Clipson says he believed; however it does not raise a question of fact as to whether Jim Clipson was acting at the direction of First National.[3] Moreover, the dispositive question is not whether John Engstrom told Jim Clipson not to sell the equipment at auction, but rather whether First National instructed him to do so. On this issue the evidence is clear and uncontroverted, it did not.

As to the second item of "evidence", petitioners state that First National documents show that First National was "planning" to "liquidate" John Engstrom's equipment at the auction. Petition at 7 & 11. This claim is simply a mischaracterization of the documents. The documents expressly reflect First National's plan to *ask* John Engstrom, to do one of three things if he could not repay the loans at maturity – move the loans, furnish high quality collateral, or liquidate. R.725. They do not state

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[3] The only other record evidence even tangentially touching on the subject is the following. John Engstrom contended in an affidavit submitted in opposition to the motion for summary judgment that while advising First National that he had asked Jim Clipson to sell his equipment he also instructed Travis Wegenhoft that Wegenhoft should not sell the equipment at auction. R.780. Jim Clipson says that some time later John Engstrom asked him to sell any equipment not sold by private treaty at the auction. R.246-49. Jim Clipson then told Travis Wegenhoft that he would be doing so. R.676.

that First National will seize and sell his equipment, as petitioners falsely assert.

The next item on which petitioners rely consists of problem loan reports containing the following statements:

> "Have arranged for Jim Clipson, Jr., to sell all of equipment. Rent house is for sale. Will suggest lowering price closer to values used here. . . . Have an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into bank's equipment auction."

R.746. The first sentences reflect no more than John Engstrom's admitted request that Jim Clipson sell his equipment at private treaty. The last sentence simply reveals that First National was aware that Jim Clipson planned to sell any remaining equipment at auction. After all Jim Clipson had told Mr. Wegenhoft that he had been asked by John Engstrom to do this. R.767. These sentences do not contradict the testimony of Jim Clipson or Mr. Wegenhoft that the Bank did not direct or even request that Jim Clipson sell the equipment at the auction. Nothing in these sentences impeaches the testimony of Jim Clipson that he placed the equipment in the auction at John Engstrom's request, nor do they support petitioners' assertion that the auction was a foreclosure sale.

B. Petitioners Did Not Raise an Issue of Fact on Their Claim That Clipson Was First National's Agent.

Petitioners also argue that a jury would have been entitled to infer that "Jim Clipson cooperated, coordinated, and worked in concert with the Bank, and/or as the Bank's agent, in foreclosing on, taking possession of, and selling the Engstroms' equipment at the auction," from the evidence that First National cooperated in Jim Clipson's private treaty sales (by advancing funds for repair and advertising and by executing bills of sale releasing its liens). Petition at 26. But the conclusion petitioners would have had the lower courts draw does not in any way follow from the evidence cited. All of the evidence of cooperation relates to the pieces of equipment sold at private treaty by Jim Clipson, as directed by John Engstrom, not to the equipment sold by Jim Clipson in the auction sale.[4] John Engstrom has never denied that the private treaty sales were pursuant to his instructions. (Indeed, John Engstrom's complaint was that Jim Clipson was not given the opportunity to sell all of the equipment at private treaty.) Mr. Engstrom in fact testified in his deposition and in his affidavit that he directed the very arrangements for advertising, repair, and commissions that petitioners now say are arrangements attributable to First National. R.780-81; 712-15. Indeed, petitioners

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[4] The Petition also asserts that there was evidence to support a claim that one of the private treaty sales – the sale of a pickup truck to L.D. Schilling – was made against John Engstrom's wishes. The sale of the pickup truck was not relevant to the motion for summary judgment, however, because petitioners asserted no claim below about this or any other private treaty sale.

themselves conceded below that "these individual sales were not part of the January 26 auction and therefore are not directly made the basis of Plaintiffs' claims for relief . . . . " R.2502. Thus, the record neither controverts Jim Clipson's and Travis Wegenhoft's testimony that First National played no role in Jim Clipson's decision to place the equipment in the auction nor does it support petitioners' claim that Jim Clipson was First National's agent.[5]

III

FIRST NATIONAL IS NOT LIABLE UNDER § 532(4) OF THE CIVIL RELIEF ACT

Petitioners next argue that they raised an issue of fact as to whether First National "caused" the auction sale in violation of section 532(4) of the Civil Relief Act. Petitioners appear to be saying that First National should be held liable if for no other reason than "but for" Sam Thomson's discussing with Billy Bode the possibility of holding an auction in Eagle Lake there would have been

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[5] Assuming *arguendo* that petitioners did raise an issue of fact as to whether First National had seized and sold John Engstrom's equipment, thereby violating the Civil Relief Act, the Fifth Circuit was nevertheless correct in affirming the summary judgment as to all petitioners other than John Engstrom, on a ground argued below but not reached. More specifically, John Engstrom, as the owner of the equipment, was the only proper party to complain of its alleged wrongful repossession; the other petitioners, who were neither owners of the equipment nor parties to the note and security agreement relating to the equipment and from whom no collection was attempted, are not. R.234, 237.

no auction and, therefore, John Engstrom's equipment could not have been sold in an auction.[6] While it is true that, if this particular auction had not occurred, Jim Clipson could not have taken the equipment to the auction to sell it, nothing follows from this. Section 532(4) of the Civil Relief Act prohibits a lender from making or causing to be made a sale, foreclosure, or seizure in satisfaction of its indebtedness. It does not purport to impose liability on a lender who does not interfere with a sale by someone else, especially when as here it is uncontroverted that the lender has been told and believes that the sale is authorized. Further, nothing in the Civil Relief Act remotely purports to put lenders to the Hobson's choice of interfering with a sale they have been told was arranged by the owner, risking liability if they are wrong, or of not interfering and being held liable because the seller's agent was allegedly acting without authority.[7]

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[6] Petitioners' complaint that the evidence supported a finding that the auction was the "bank's auction" is similarly misguided. Even if the auction were First National's auction that would not change the essential fact that Jim Clipson was not asked by First National to sell John Engstrom's equipment at the auction. R.246-49. Nothing in the Civil Relief Act purports to impose liability on an auctioneer if a neighbor sells equipment at the auction mistakenly believing that he has been asked by the owner to do so.

[7] Petitioners also complain of the Fifth Circuit's determination that petitioners had no claim under section 532(4) of the Civil Relief Act, because it is a criminal statute, but offer no argument or authority in support of their complaint. Petition at 28.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Mr. Clipson testified as follows:

Q. Was it Travis [Wegenhoft, an employee of First National] that asked you to go ahead and bring the equipment in for the auction?

A. No, John [Engstrom] asked me to do it.

Q. When did John ask you to do that?

A. He asked me on the road one day there. It was later, after we had talked about the 5 percent and everything that I was going to get for commission, that he thought that his father was going to get it done for him and that if he didn't though, would I do it.

Q. That was before he had gone off to the war; is that right?

A. Yes, sir. Seems like he came back for a weekend or something. I don't know. It was at a later time though than when we first started talking about it.

Q. You say he asked you. Did he ever put that in writing to you?

A. No, he just asked me to do it for him.

* * *

Q. Now, I believe I recall you saying that the equipment was at three different locations; is that right?

A. Yes, sir.

Q. And they remained at three different locations for how long?

A. I just tried to keep selling them from the location that they were at right up to the

last minute there. And then it – if I'd known I was going to have to move them earlier, it would have been a lot better because it started raining and they made a pipeline across the road going into where their equipment was.

Q. How did you find out you were supposed to move them when you did?

A. Well, John had just asked me to move them if it didn't look like that his father was going to be able to get his brothers to do that. So, within about two weeks and nothing had happened, seemed like it might have been another lag of a day or two before we actually got into the work of moving them. Of course, it was raining and wet; and we couldn't do anything anyway.

R.246-49.

Mr. Wegenhoft testified:

Q. So, the bank didn't sell it [the equipment] at the auction sale?

A. No.

Q. Who did?

A. John Engstrom instructed Jim Clipson to deliver it to the sale. Well, that's my understanding; but from here it sounded like John Engstrom's folks were supposed to deliver it.

Q. So, it's the position of the bank that they didn't instruct anybody to sell this at the auction, correct?

A. That's right.

Q. That they didn't take possession of this equipment at all.

A. Right.

Q. And that's why we see no notices of sale in here, in any of these files, do we, because the bank didn't sell it?

A. That's right.

Q. And they didn't repossess it.

A. That's right.

R.242.